Supreme Court, U.S.
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In The

Supreme Court of the United States

TELECHECK SERVICES, INC., TELECHECK INTERNATIONAL, INC. and FIRST DATA CORPORATION,
Petitioners,

v.

CHERYL BEAUDRY, individually and on behalf of all others similarly situated,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 23, 2010

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QUESTION PRESENTED

Whether the 1996 amendment to Section 1681n of the Fair Credit Reporting Act, 15 U.S.C. § 1681n, allows uninjured private litigants to pursue claims for willful violations of the Fair Credit Reporting Act that have heretofore always required proof of injury.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioners TeleCheck Services, Inc., TeleCheck International, Inc., and First Data Corporation provide the following disclosure.

TeleCheck Services, Inc. is a wholly owned subsidiary of TeleCheck International, Inc. TeleCheck International, Inc. is a wholly owned subsidiary of First Data Corporation, which is a privately held corporation. No publicly held corporation owns 10% or more of the stock in TeleCheck Services, Inc., TeleCheck International, Inc., or First Data Corporation.

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Petitioners TeleCheck Services, Inc., TeleCheck International, Inc., and First Data Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 579 F.3d 702. The dismissal order and accompanying memorandum of the district court (App., *infra*, 18a-36a) is unreported.

JURISDICTION

The court of appeals' judgment was entered on August 28, 2009. A timely petition for rehearing en banc was denied on November 25, 2009 (App., *infra*, 37a-38a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1681e(b) of the Fair Credit Reporting Act, Title 15, United States Code, provides, in relevant part:

> Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

Section 1681i(a)(1)(A) of the Fair Credit Reporting Act, Title 15, United States Code, provides, in relevant part:

> [I]f the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly, or indirectly through a reseller, of such dispute, the agency shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate . . .

Section 1681n of the Fair Credit Reporting Act, Title 15, United States Code, provides, in relevant part:

> Civil liability for willful noncompliance
>
> (a) In general. Any person who willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of--
>
> (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $ 100 and not more than $ 1,000;

STATEMENT OF THE CASE

I. BACKGROUND FACTS AND ISSUES

This case, which arises under Section 1681e(b) of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"), stems from a 2002 change to the State of Tennessee's driver's license numbering system.

On or about February 2002, the State of Tennessee changed its driver's license numbering system from an eight-digit system to a nine-digit system. To transition existing Tennessee drivers from the eight-digit system to the nine-digit system, the state added a leading zero to each driver's existing license number when each driver renewed his or her license.

Petitioners, who provide check verification services to merchants and account opening services to financial institutions, regularly use Tennessee driver's license numbers to identify individuals about whom they provide consumer checking account information.

Respondent, who is a resident of Tennessee, renewed her driver's license at some point after February 2002. As a result, her current Tennessee driver's license number consists of a zero followed by her former license number. Respondent claims she has presented checks or electronic funds transfers to businesses utilizing Petitioners' check verification services and/or to banks utilizing Petitioners' account services.

Respondent does not claim to have suffered actual harm as a result of any acts or omissions of Petitioners, and Respondent entirely failed to plead that she has had a check declined, a transaction terminated, or otherwise suffered any injury as a result of any consumer report furnished by Petitioners.[1] Respondent alleges that Petitioners

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[1] Rule 12(b)(6) requires Petitioners to accept as true the allegations in Respondent's Complaint, including the allegation that the information provided to merchants by Petitioners are

violated Section 1681e(b) of the FCRA by willfully and unreasonably failing to modify their procedures to account for Tennessee's new license numbering system, even though this alleged failure had no effect on her ability to write checks or open bank accounts.

Section 1681e(b) of the FCRA states: "Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."

Respondent specifically alleges that Petitioners' acts or omissions violated Section 1681e(b) of the FCRA because, following Respondent's license renewal, Petitioners' procedures allegedly failed to correlate her new license number with her old license number. As a result, Respondent alleges, Petitioners incorrectly categorized Respondent as a first-time check writer after she renewed her license, even though this alleged categorization had no effect on a merchant's or bank's decision to accept her check or approve her application to open a bank account.

On October 15, 2007, Petitioners filed a motion to dismiss Respondent's complaint asserting that FCRA Section 1681e(b) does not allow an uninjured plaintiff to mount a freestanding challenge to the

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"consumer reports" as defined by the FCRA. Petitioners' references to "reports" for purposes of this petition and Petitioners' underlying motion to dismiss are not intended to waive or contradict arguments in this or other lawsuits that certain recommendations provided to merchants do not constitute "consumer reports."

reasonableness of a consumer reporting agency's procedures. Since the statute's inception, an essential element of claims under FCRA Section 1681e(b) is injury proximately caused by a defendant's unreasonable procedures.

In her response, Respondent asserted that her complaint should not be dismissed because FCRA Section 1681n allows uninjured plaintiffs to pursue claims related to willful noncompliance with the FCRA.

Section 1681n of the FCRA states, in relevant part:

> Civil liability for willful noncompliance
>
> (a) In general. Any person who willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of--
>
> (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $ 100 and not more than $ 1,000;

Prior to 1996, Section 1681n did not provide for statutory damages. Congress added the statutory damages election of remedies to Section 1681n(a)(1)(A) by amendment in 1996. FCRA Section 1681e(b), however, has remained unchanged since its enactment in 1968, and both pre-1996 and post-1996 case law has retained the injury requirement as an element of violations of that FCRA subsection.

II. THE PROCEEDINGS BELOW

On June 10, 2008, the United States District Court for the Middle District of Tennessee issued an order dismissing Respondent's Complaint. App. 18a-36a. In the accompanying memorandum, the Court held that "proof of harm or injury is one of four essential elements of an FCRA claim, regardless of whether the plaintiff alleges there was a willful violation" and rejected Respondent's argument that the 1996 amendment to FCRA Section 1681n removed the injury element from Section 1681e(b) violations. App. 27a. Because Respondent was not injured as a result of any acts or omissions of Petitioners, the court held Respondent could not bring claims against Petitioners under FCRA Section 1681e(b). App. 29a.[2]

On appeal, the United States Court of Appeals for the Sixth Circuit reversed the district court's dismissal order. App. 1a-17a. The Sixth Circuit held that because FCRA Section 1681n "permits a recovery when there are no identifiable or measurable actual damages . . . a claimant need not suffer (or allege) consequential damages to file a claim." App. 7a.

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[2] Respondent's complaint alleges that Respondent "now [suffers] and will continue to suffer irreparable injury." (*See* Compl. ¶¶ 98, 102.) However, the District Court held that "this allegation is a conclusory statement unsupported by any factual allegations in her Complaint." App. 26a. Consequently, the District Court disregarded the allegation because it fell short of satisfying the Respondent's Rule 8 obligations as articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *Id.* The Sixth Circuit did not rely in any manner on this conclusory allegation in its decision.

On November 25, 2009, the Sixth Circuit denied Petitioners' timely petition for rehearing en banc. App. 37a-38a.

On December 23, 2009, following a motion by Petitioners, the Sixth Circuit issued an order staying its mandate to allow this petition to be filed by Petitioner and considered by this Court. App. 39a-40a. Within the Sixth Circuit, a stay of the mandate requires a showing or independent determination that "a petition for writ of certiorari would present a substantial question and that there is good cause for a stay." Sixth Circuit Rule 41(a).

Petitioners respectfully petition for a writ of certiorari to resolve the question of whether the 1996 amendment to FCRA Section 1681n allows uninjured private litigants to pursue claims for willful FCRA violations that have heretofore always required proof of injury.[3]

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for writ of certiorari for two reasons. First, there is a distinct split of opinion among the circuit courts of appeals as to whether the 1996 amendment to Section 1681n of the FCRA allows plaintiffs who have not been injured to pursue FCRA claims that have heretofore always required proof of injury. Second, the effect of the 1996

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[3] The FCRA provisions that have heretofore always required proof of injury are Section 1681e(b), which requires "reasonable procedures" to assure accuracy in consumer reports, and Section 1681i(a), which requires a "reasonable reinvestigation" to determine whether disputed information is inaccurate.

amendment to FCRA Section 1681n is an important question of federal law that has not been, but should be, settled by this Court.

I. THE CIRCUITS ARE SPLIT

a. The United States Courts Of Appeals For The Sixth And Seventh Circuits Are In Direct Conflict Concerning The Effect Of The 1996 Amendment To FCRA Section 1681n

At the heart of this circuit split lies the question of whether the 1996 amendment to FCRA Section 1681n, which provided a statutory damages remedy for violations of the FCRA, abrogated the injury element from violations of FCRA Sections 1681e(b) and 1681i(a). In contrast to the other substantive sections of the FCRA, these two sections alone apply a reasonableness standard to the restrictions they impose, and the federal courts since 1996 have generally treated these two sections differently from other sections of the FCRA. Thus, although multiple federal courts have held that the 1996 amendment to Section 1681n relieved plaintiffs from having to demonstrate actual injury related to claims for willful violations of other FCRA sections, federal court decisions up until the Sixth Circuit's decision below have required plaintiffs suing under Sections 1681e(b) and 1681i(a) to demonstrate injury.

The decision below requires this Court's review because it is in direct conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *Ruffin-Thompkins v. Experian Information Solutions, Inc.*, 422 F.3d 603 (7th Cir. 2005).

In *Ruffin-Thompkins*, the plaintiff alleged that Experian violated FCRA Section 1681i(a) by failing to conduct a reasonable reinvestigation of her credit history after she disputed the accuracy of a consumer report generated by Experian. *Id.* at 607.

FCRA Section 1681i(a) requires consumer reporting agencies to conduct a reasonable reinvestigation of a consumer's credit history when a consumer disputes the completeness or accuracy of any item of information contained in the consumer's file. 15 U.S.C. § 1681i(a). Like FCRA Section 1681e(b), Section 1681i(a) establishes a "reasonableness" standard for a defendant's conduct. Also like FCRA Section 1681e(b), a plaintiff's claim under Section 1681i(a) requires a plaintiff to demonstrate that he or she suffered actual injury as a result of a consumer reporting agency's failure to conduct a reasonable reinvestigation. *See Ruffin-Thompkins*, 422 F.3d at 608 (citing *Sarver v. Experian Info. Solutions*, 390 F.3d 969, 971 (7th Cir. 2004)); *see also Wantz v. Experian Info. Solutions*, 386 F.3d 829, 833 (7th Cir. 2004); *Lenox v. Equifax Info. Servs., LLC*, No. 05-1501-AA, 2007 WL 1406914, at *4 (D. Or. May 7, 2007).

In *Ruffin-Thompkins*, the plaintiff had not suffered any actual injury as a result of Experian's alleged failure to conduct a reasonable reinvestigation of her credit history. *Id.* at 609-610. As in the case at bar, the *Ruffin-Thompkins* plaintiff argued that she was entitled to statutory damages pursuant to FCRA Section 1681n even if she suffered no actual injury. *Id.* at 610.

The Seventh Circuit rejected the *Ruffin-Thompkins* plaintiff's argument, holding that Section 1681n's

statutory damages provision does not allow uninjured plaintiffs to recover statutory damages where the underlying FCRA violation requires proof of injury. *Id.* Because injury is an established element of violations of FCRA Section 1681i(a), the court affirmed the district court's grant of summary judgment against the uninjured plaintiff. *Id.*

The United States District Court for the Northern District of Illinois succinctly summarized the *Ruffin-Thompkins* holding by stating, "[s]ince the plaintiff could not establish her underlying FCRA claim under 1681i because she could not prove actual pecuniary harm, her claim for statutory damages failed." *Cavin v. Home Loan Center, Inc.*, 236 F.R.D. 387, 393 (N.D. Ill. 2006).

The Sixth Circuit's decision in the instant case fundamentally conflicts with this Seventh Circuit holding.

Respondent's complaint alleges that Petitioners violated FCRA Section 1681e(b) by failing to adopt procedures to link consumers' identifiers together after the State of Tennessee changed its driver's license numbering system. (Compl. ¶¶ 86-103.) Specifically, Respondent alleges that Petitioners' procedures unreasonably failed to correlate her old driver's license number with her new driver's license number and that, as a result, consumer reports generated by Petitioners incorrectly characterized Respondent as a first-time check writer. *Id.*

FCRA Section 1681e(b) requires consumer reporting agencies to follow reasonable procedures to assure maximum possible accuracy of the information

concerning the individual about whom a consumer report relates. 15 U.S.C. § 1681e(b). As the district court stated below, "to establish a *prima facie* case of inaccuracy under 15 U.S.C. § 1681e(b), a plaintiff must prove: '(1) the defendant reported inaccurate information about the plaintiff; (2) the defendant either negligently or willfully failed to follow reasonable procedures to assure maximum possible accuracy of the information about the plaintiff; (3) ***the plaintiff was injured***; and (4) the defendant's conduct was the proximate cause of the plaintiff's injury.'" App. 25a (citing *Nelski v. Trans Union, LLC*, 86 F. App'x 840, 844 (6th Cir. 2004) (emphasis added)). With this holding, the district court decision joined all prior decisions on this issue in determining that plaintiffs must demonstrate injury to succeed on claims for violations of FCRA Section 1681e(b). *See* Section I.b, *infra* (surveying case law related to violations of FCRA Section 1681e(b)).

Respondent entirely failed to plead that she has had a check declined, has had any transaction terminated, or has otherwise suffered any injury as a result of any consumer report furnished by Petitioners. In other words, Petitioners' allegedly willful and unreasonable act – the decision not to migrate consumer data from the old license number to the new one – had no deleterious effect on Respondent. Respondent asserts that FCRA Section 1681n's provision of a statutory damages remedy eviscerates her obligation to plead injury as an essential element of her claim under FCRA Section 1681e(b). (*See, generally,* Resp. to Mot. to Dismiss.)

Unlike the Seventh Circuit in *Ruffin-Thompkins*, the Sixth Circuit below determined that the 1996

amendment to FCRA Section 1681n did remove the injury requirement from the *prima facie* case for violations of, in this case, FCRA Section 1681e(b).[4] App. 1a-17a. In the Sixth Circuit, therefore, uninjured plaintiffs seeking statutory damages and alleging willful violations can now proceed against consumer reporting agencies regardless of whether the FCRA section allegedly violated has heretofore always required proof of injury.

As a result, the laws of the United States governing this aspect of the FCRA are irreconcilably in conflict. In the Seventh Circuit, Section 1681n's statutory damages provision does not affect the substantive elements of any specific FCRA violation, including the well-settled injury element of FCRA Sections 1681e(b) and 1681i(a). In the Sixth Circuit, by contrast, Section 1681n's statutory damages provision ensures that any plaintiff, regardless of whether that plaintiff has been injured, may bring FCRA claims against a consumer reporting agency even if those FCRA claims have heretofore always required proof of injury.

As is readily apparent from these decisions, the effect of the 1996 amendment to FCRA Section 1681n

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[4] In one instance, the Sixth Circuit's opinion describes its holding as preserving the injury requirement under Section 1681e(b) by redefining "injury" as a consumer reporting agency's use of unreasonable procedures related to the generation of a consumer report. (App., *infra*, 13a). However, this definition functionally removes the injury requirement from Section 1681e(b) claims, as the term "injury" had been defined in previous decisions, by no longer requiring proof of either pecuniary harm or injury to credit, such as a rejected check or a declined transaction.

on FCRA Sections 1681e(b) and 1681i(a) is an issue ripe for resolution by this Court.

b. The United States Court Of Appeals For The Sixth Circuit Is In Direct Conflict With Every Federal Court That Has Addressed The Injury Element Of FCRA Section 1681e(b)

i. The Sixth Circuit's Decision Conflicts With All Federal Decisions Issued In Other Federal Circuits

The Sixth Circuit's decision further demands review by this Court because its interpretation of the effect on claims under FCRA Section 1681e(b) of the 1996 amendment to FCRA Section 1681n conflicts with the decisions of every other circuit and district court known to Petitioners to have considered claims based upon Section 1681e(b) to date.

Simply put, injury has always been an "essential element" of claims under FCRA Section 1681e(b). *See, e.g., George v. Equifax Mortgage Servs.*, No. 06-cv-971(DLI)(LB), 2008 WL 4425299, at *7 (E.D.N.Y. Sept. 30, 2008) (listing injury as one of the four essential elements of Section 1681e(b) violations); *Garrett v. Trans Union, LLC*, No. 2:04-cv-00582, 2006 WL 2850499, at *13-14 (S.D. Ohio Sept. 29, 2006); *Pettus v. TRW Consumer Credit Serv.*, 879 F. Supp. 695, 697-98 (W.D. Tex. 1994). Furthermore, it has always been a plaintiff's burden to establish the existence of this essential element. *See Jackson v. Equifax Info. Servs., LLC*, 167 F. App'x 144, 146 (11th Cir. 2006). If a plaintiff fails to satisfy this burden, her claim must be dismissed. *See, e.g., Sternaman v. Experian Info.*

Solutions, Inc., No. 00-402 ADM/FLN, 2001 WL 1478662, at *3-4 (D. Minn. Nov. 19, 2001); *Whelan v. Trans Union Credit Reporting Agency*, 862 F. Supp. 824, 832 (E.D.N.Y. 1994).

Accordingly, to maintain a FCRA claim under Section 1681e(b), a plaintiff has always had to show she was injured as a result of a defendant's allegedly inaccurate consumer report. *See, e.g., Johnson v. Equifax, Inc.*, No. 3:05-0633, 2007 WL 1589536, at *5 (S.D. Ala. May 31, 2007); *see also Breed v. Nationwide Ins. Co.*, No. 3:05CV-547-H, 2007 WL 1408212, at *3 (W.D. Ky. May 8, 2007) (stating that, to establish liability under Section 1681e(b), the plaintiff was required to show an inaccurate entry on his credit report was a substantial factor in bringing about the denial of credit).

By the time Congress amended FCRA Section 1681n in 1996, the federal courts had firmly established injury as an element of Section 1681e(b) violations. *See, e.g., Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1160-61 (11th Cir. 1991) (holding that a plaintiff's claims under Section 1681e(b) must be dismissed because the plaintiff had "utterly failed" to produce evidence "tending to show that he was damaged as a result of an allegedly inaccurate [] credit report."); *Whelan*, 862 F. Supp. at 829, 832 (E.D.N.Y. 1994) (listing injury as one of the four essential elements of claims under FCRA Section 1681e(b) and granting summary judgment in favor of defendants in part because plaintiffs failed to establish injury); *Neptune v. Trans Union Corp.*, No. 92-6193, 1993 WL 505601, at *1-2 (E.D. Pa. Dec. 8, 1993) (same).

This judicial unanimity did not come to an end following Congress' 1996 amendment to Section 1681n. Rather, federal courts over the fourteen years since the 1996 amendment have continued to agree that injury is an element of Section 1681e(b) violations. *See, e.g., Jackson*, 167 F. App'x at 146 (11th Cir. 2006) (affirming grant of summary judgment because the plaintiff "failed to produce any evidence indicating that he was damaged as a result of an allegedly inaccurate Equifax report"); *Birmingham v. Equifax, Inc.*, No. 2:06-cv-007021, 2009 WL 194985, at *2 (D. Utah Jan. 26, 2009) (granting summary judgment because the plaintiff failed to provide evidence that he suffered any injury or that the defendant caused his alleged injury); *Collins v. Experian Credit Reporting Serv.*, 494 F. Supp. 2d 127, 134-36 (D. Conn. 2007) (listing injury as one of the essential elements of Section 1681e(b) violations and granting the defendants' motions for summary judgment because the plaintiff failed to provide any evidence supporting his claim that the allegedly inaccurate report was the proximate cause of any injury he suffered); *Johnson*, 2007 WL 1589536, at *5-6 (same); *Jordan v. Trans Union LLC*, No. 1:05CV305 GET, 2006 WL 1663324, at *6 (N.D. Ga. June 12, 2006) (granting summary judgment because the plaintiff did not demonstrate the defendant's allegedly inaccurate report caused him any harm or that his credit denials were based on the defendant's report).

In fact, in several cases decided since 1996, federal district courts have granted summary judgment in favor of defendants for failure to provide sufficient evidence of injury where plaintiffs have expressly alleged willful violations and sought statutory damages under Section 1681e(b). *See, e.g., Davis v.*

Equifax Info. Servs., LLC, 346 F. Supp. 2d 1164, 1171, 1174 (N.D. Ala. 2004) (granting summary judgment against a plaintiff seeking damages for allegedly willful violations of Section 1681e(b) because the plaintiff proved no injury); *Sternaman*, 2001 WL 1478662, at *3-4 (granting summary judgment in favor of a defendant because the plaintiff could not establish that the defendant's allegedly willful violations of Section 1681e(b) caused her injury).

It is well settled that if a plaintiff fails to allege she suffered an injury as a result of an inaccurate report, her Section 1681e(b) claim must be dismissed. The Sixth Circuit's decision below, by contrast, reinterprets FCRA law to allow any uninjured consumer to mount a freestanding challenge to the internal procedures of a consumer reporting agency, so long as the consumer reporting agency has furnished consumer reports related to the consumer. The Sixth Circuit's creation of literally millions of uninjured, private attorneys general does not accord with Congress' express grant of authority to the Federal Trade Commission to enforce compliance with the FCRA. *See Kekich v. Travelers Indem. Co.*, 64 F.R.D. 660, 668 (W.D. Pa. 1974) ("Given the fact that the FTC has the express power to enforce compliance . . . there appears to be no reason for a private attorney general, an office which the plaintiff seems to have assumed.").

Moreover, this case neatly illustrates the threat posed to credit reporting agencies by the Sixth Circuit's decision. Respondent has never had a check rejected or any other transaction terminated as a result of any report furnished by Petitioners to any merchant or bank, and yet Respondent seeks to certify and join a class of "hundreds of thousands, if not

millions" of similarly situated, uninjured Tennessee driver's license holders to seek statutory damages based upon "millions, if not billions, of transactions." (Compl. ¶ 65.) Such multibillion dollar suits, which will impose a substantial and potentially fatal financial burden on credit reporting agencies, are avoided by maintaining the longstanding injury element of a claim under FCRA Section 1681e(b).

As will be further discussed in merits briefing, the injury requirement for FCRA Section 1681e(b) and Section 1681i(a) proceeds from the text of these provisions, which incorporates "reasonableness" into the statutory violation. Unlike other FCRA provisions, which do not require a determination of the reasonableness of the defendant's conduct, these Sections expressly carry with them the common law tort requirement that a cause of action allege injury and proximate causation. This requirement is also essential to a claim under Section 1681e(b) because the FCRA does not impose "strict liability for errors or provide a means for merely correcting an erroneous report." *Pettus*, 879 F. Supp. at 697.

Furthermore, although the legislative history does not provide guidance on this question, Respondent contends that Congress' purpose in enacting a statutory damages remedy in 1996 was not to displace the essential element of injury for those FCRA provisions that, to date, had always required such an element. Instead, Congress sought to provide a remedy against consumer reporting agencies that cause small or difficult-to-prove injuries. This purpose is consistent with what is generally understood to be the function of a statutory damages remedy. *See, e.g.*, *Crabill v. Trans Union, LLC*, 259 F.3d 662, 665 (7th

Cir. 2001) ("Many statutes . . . authorize the award of damages (called "statutory damages") for violations that cause *so little measureable injury* that the cost of proving up damages would exceed the damages themselves, making the right to sue nugatory.") (emphasis added).

That purpose is readily illustrated by the allegations at issue in Respondent's complaint. Petitioners provide recommendations to merchants whether to accept or decline a consumer's check at the point of sale. According to Respondent's complaint, Petitioners in every instance appear to have recommended that the Respondent's checks be accepted. In contrast, a consumer whose check is declined has arguably suffered an injury to credit. In all likelihood, however, after the check is declined, the consumer will complete the purchase with an alternate form of payment, such as cash or credit card.

It is that scenario – an injured consumer whose monetary damages are nonexistent or very difficult to prove – for which Congress intended to provide a remedy by enacting statutory damages for willful violations. Respondent, who has sustained no injury at all, should not be allowed to bring a claim under FCRA Section 1681e(b), even one alleging a willful violation. It is unreasonable to assume, as the Sixth Circuit's decision does, that Congress intended to grant Respondent and other consumers whose checks were all recommended for acceptance, a claim for $1,000 in statutory damages, plus punitive damages and attorney's fees.

ii. The Sixth Circuit's Decision Conflicts With All Prior Federal Court Decisions Issued In The Sixth Circuit

Prior to the decision below, federal courts in the Sixth Circuit had also made it clear that a plaintiff cannot succeed on a claim under FCRA Section 1681e(b) unless she proves that a defendant's acts or omissions were the proximate cause of an actual injury. *See, e.g., Nelski*, 86 F. App'x at 844; *see also Currier v. Transunion Credit Info. Co.*, No. 06-12365, 2008 WL 795738, at *4 (E.D. Mich. Mar. 25, 2008); *Holmes v. TeleCheck Int'l, Inc.*, 556 F. Supp. 2d 819, 830-31 (M.D. Tenn. 2008); *Breed*, 2007 WL 1408212, at *1; *Sciria v. Huntington Bank*, No. 1:05CV0533, 2005 WL 3262954, at *3 (N.D. Ohio Dec. 1, 2005).

For example, in *Garrett v. Trans Union, L.L.C.*, the United States District Court for the Southern District of Ohio dismissed a plaintiff's claims for negligent and willful violations of FCRA Section 1681e(b) because, even if there were inaccuracies in the credit report issued by the defendant in that case, the plaintiff had not shown he had suffered any injury as a result of those inaccuracies. 2006 WL 2850499, at *14. In fact, the court noted that, not only had the plaintiff not been denied any credit, the plaintiff had actually received offers of credit following the allegedly inaccurate report. *Id.* As a result, the court found the plaintiff had not suffered any injury resulting from the alleged inaccuracies in his credit report and dismissed the plaintiff's claims under § 1681e(b). *See id.*

The Sixth Circuit itself even listed injury as a mandatory element of Section 1681e(b) violations as recently as 2004 in its decision in *Nelski v. Trans*

Union, LLC, 86 F. App'x at 844 ("In order to assert a claim under § 1681e(b), a plaintiff must prove: (1) the defendant reported inaccurate information about the plaintiff; (2) the defendant either negligently or willfully failed to follow reasonable procedures to assure maximum possible accuracy of the information about the plaintiff; (3) ***the plaintiff was injured***; and (4) the defendant's conduct was the proximate cause of the plaintiff's injury.") (emphasis added).[5]

Similarly, in *Ray v. Equifax Info. Servs., LLC*, the United States Court of Appeals for the Eleventh Circuit recently affirmed its long-held determination that plaintiffs must prove injury to successfully assert claims under Section 1681e(b). 327 Fed. App'x. 819, 826 (11th Cir. 2009). *See also Cahlin*, 936 F.2d at 1160-61.

Only the Sixth Circuit, in its decision below, has determined that the statutory damages amendment to FCRA Section 1681n removed the injury element from claims brought under Section 1681e(b). In the face of

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[5] In its decision below, the Sixth Circuit discounted its prior decision in *Nelski* because it is unpublished and, according to the panel, "pure dictum." (App., *infra*, 11a). Neither rationale should be sufficient to so easily dismiss *Nelski*. First, at least since 2006 when Fed. R. App. P. 32.1 became effective, federal courts have been reluctant to ignore caselaw simply because it is unpublished. Lower courts frequently rely on unpublished decisions, particularly when those decisions set forth the elements of a federal statutory claim, as evidenced by the district courts that have relied on *Nelski* for its statement of the elements of a § 1681e(b) claim. *See, e.g., Currier*, 2008 WL 795738, at *4; *Holmes*, 556 F. Supp. 2d at 830-31. Second, a court's recitation of the essential elements of a claim when reviewing an order granting summary judgment cannot be considered pure dictum.

unanimous authority to the contrary, the Sixth Circuit disregarded all cases predating the 1996 amendment to Section 1681n, disregarded all cases that cited cases predating the 1996 amendment, and assumed that all other courts that have decided Section 1681e(b) claims since the 1996 amendment must not have contemplated the effect of the 1996 amendment because none of them expressly addressed the 1996 amendment. App. 10a-13a.

The Sixth Circuit's assumption is untenable given the realities of FCRA litigation. Because of the statute's generous remedial provisions, including punitive damages and fee-shifting, the federal court dockets include an enormous number of FCRA lawsuits. Given the thoroughness with which courts have analyzed the FCRA since 1996, it is unlikely that courts have unanimously overlooked what the Sixth Circuit described as "the critical 1996 amendment." (App., *infra*, 12a). It is even more unlikely to assume that for fourteen years the FCRA plaintiff's bar has ignored an argument that would have required a different result in a number of cases under § 1681e(b) alleging willful violations in which summary judgment was granted to defendants on the specific ground of failure to provide sufficient evidence of injury.

Petitioners assert, as the more reasonable assumption, that over the course of the past fourteen years the courts and litigants who have addressed this issue did, in fact, contemplate the 1996 amendment to Section 1681n and understood that it was intended to offer a new remedy to plaintiffs and not to alter the well-established elements necessary to state a claim under FCRA Section 1681e(b). This more reasonable assumption also appropriately acknowledges the

courts and litigants involved in FCRA cases over the past decade. Rather than attempt to reconcile the 1996 amendment with the fact that courts after the amendment have continued to require plaintiffs to prove injury in a claim under § 1681e(b), the Sixth Circuit instead treats all decisions since 1996 as simply being misinformed.

II. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW

The Sixth Circuit's decision to eliminate injury as an essential element of a claim under FCRA Section 1681e(b) presents an important question of federal law that should be settled by this Court, and this case is perfectly suited as a platform for this Court to do so.

As discussed above, prior to the Sixth Circuit's decision, federal courts across the country had uniformly required a plaintiff bringing a claim under Section 1681e(b) to allege "injury" as one of the essential elements of her claim. Many of these decisions were issued after the 1996 amendment to FCRA Section 1681n, which provided an election of remedies (statutory or actual damages) for willful violations of the FCRA. Moreover, until the Sixth Circuit issued its decision below, no court had held that the addition of statutory damages as a possible remedy under Section 1681n was also intended to eviscerate the requirement that a plaintiff prove injury as part of a Section 1681e(b) claim.

This case is ready made for the Court to resolve this split of authority because the Sixth Circuit's opinion rests entirely on its novel interpretation of the

1996 amendment to FCRA Section 1681n. Respondent did not plead any injury as a result of Petitioners' alleged violation of FCRA Section 1681e(b), and Respondent's claims, therefore, can only proceed if the 1996 amendment removed the injury element from Section 1681e(b) claims. Thus, the effect of the 1996 amendment to FCRA Section 1681n is dispositive for this matter in its current procedural posture.

For Petitioners and other similarly situated entities around the country, only a decision by this Court can resolve this now-unsettled question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 23, 2010

APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-6428

[Filed August 28, 2009]

CHERYL BEAUDRY, individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

TELECHECK SERVICES, INC., TELECHECK INTERNATIONAL, INC. AND FIRST DATA CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Tennessee at Nashville.
No. 07-00842—Aleta Arthur Trauger, District Judge.

Argued: August 6, 2009

Decided and Filed: August 28, 2009

Before: KEITH, SUTTON
and WHITE, Circuit Judges.

COUNSEL

ARGUED: Martin D. Holmes, DICKINSON WRIGHT PLLC, Nashville, Tennessee, for Appellant. David R. Esquivel, BASS BERRY & SIMS, PLC, Nashville, Tennessee, for Appellee. **ON BRIEF:** Martin D. Holmes, DICKINSON WRIGHT PLLC, Nashville, Tennessee, for Appellant. David R. Esquivel, Wallace W. Dietz, Stephen J. Jasper, BASS BERRY & SIMS, PLC, Nashville, Tennessee, for Appellee.

OPINION

SUTTON, Circuit Judge. Cheryl Beaudry appeals the district court's dismissal of her lawsuit under the Fair Credit Reporting Act (FCRA or the Act). Because FCRA's private right of action does not require proof of actual damages as a prerequisite to the recovery of statutory damages for a willful violation of the Act, we reverse.

I.

In 2007, Cheryl Beaudry sued the defendants, a group of foreign corporations who provide check-verification services. According to Beaudry, the defendants failed to account for a 2002 change in the numbering used by the Tennessee driver's license

system, leading their systems to reflect incorrectly that many Tennessee consumers, including Beaudry, were first-time check-writers. Claiming that this error affected her and "hundreds of thousands, if not millions," of other Tennesseans, Class Action Compl., R. 1, ¶ 65 (Aug. 17, 2007), she sought to represent a class of affected consumers, contending that the defendants' willful failure to provide accurate information entitled the class members to "declaratory relief, injunctive relief, statutory damages, punitive damages, attorneys' fees, costs and expenses." *Id.* ¶ 99.

The defendants filed a motion to dismiss on two grounds: that her complaint failed to allege that she had been injured by a FCRA violation and that the statute of limitations had run. Beaudry argued that neither ground for dismissal applied, and that in the alternative the statute permitted her to obtain forward-looking injunctive relief. The district court granted the motion on the ground that she had not alleged any injury and that the statute does not authorize courts to grant injunctive relief.

II.

We give fresh review to the district court's dismissal of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Bowman v. United States*, 564 F.3d 765, 769 (6th Cir. 2008). In deciding whether a complaint has stated a claim on which relief can be granted, we "construe the complaint in favor of the plaintiff, accept the allegations of the complaint as true, and determine whether plaintiff's factual allegations present plausible claims." *Id.*

The Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, places a number of restrictions on "consumer reporting agencies," meaning any individual or "other entity" who "regularly . . . assembl[es] or evaluat[es] consumer credit information . . . for the purpose of furnishing consumer reports to third parties." *Id.* § 1681a(b), (f). One of the Act's (many) requirements is that consumer reporting agencies must "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom" a credit report relates. *Id.* § 1681e(b).

To ensure compliance with its mandates, the FCRA contains several enforcement mechanisms: (1) The Federal Trade Commission may bring an administrative action against violators of the Act, *see id.* § 1681s(a); (2) federal executive agencies that regulate certain types of consumer reporting agencies—such as the FDIC, which has jurisdiction over depository banks—may enforce the Act, *see id.* § 1681s(b); (3) state Attorneys General may bring enforcement actions to recover damages and to enjoin future violations, *see id.* § 1681s(c); and (4) private individuals may obtain relief against "willful[]" or "negligent" violators of the Act, *see id.* §§ 1681n, 1681o. The last enforcement mechanism—the private right of action—concerns us here.

The statute describes the willfulness private right of action in this way:

> Any person who willfully fails to comply with any requirement imposed under [the FCRA] with respect to any consumer is liable to that consumer in an amount equal to the sum of—

> (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or
>
> (B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;
>
> (2) such amount of punitive damages as the court may allow; and
>
> (3) in the case of a successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

Id. § 1681n(a). The negligence action is worded similarly: It provides that "[a]ny person who is negligent in failing to comply with any requirement imposed under [the FCRA] with respect to any consumer is liable to that consumer." *Id.* § 1681o. Unlike a willfulness claimant, however, the statute permits a negligence claimant to recover only actual damages, costs and attorney's fees. *Id.*

The district court, Beaudry claims, erred in dismissing her lawsuit on the ground that the complaint failed to allege that the FCRA violation injured her. We agree.

Beaudry, to start, alleged that the defendants violated § 1681e(b) "with respect to" her, just as the

statute requires. *Id.* § 1681n(a). "Whenever a consumer reporting agency prepares a consumer report," the provision says, "it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." *Id.* § 1681e(b). According to Beaudry's complaint, she has "presented checks to businesses utilizing Defendants' [check] verification services," Compl. ¶ 13, and "each time a transaction is processed by Defendants, a new consumer report is generated," *id.* ¶ 58. Since Tennessee changed the numbering system for its driver's licenses in 2002, those reports systematically have been based on inaccurate information because the new license numbers make consumers, including Beaudry, "appear as a first-time check writer" within the defendants' systems. *Id.* ¶ 60. All that the defendants need to do to correct the problem, she claims, is to "associate the old driver['s] license number with the new driver['s] license number." *Id.* Beaudry thus claims to have suffered the precise "injury" that the statute proscribes: The defendants "prepare[d] a consumer report" about her but failed to "follow reasonable procedures to assure maximum possible accuracy of the information" it contained. 15 U.S.C. § 1681e(b).

The defendants, however, insist that the statute requires something more—that Beaudry allege a different form of "injury": consequential damages. "Plaintiff," they note, "has not . . . had a check rejected or any other transaction terminated as a result of a TeleCheck recommendation"; nor has she "suffered any harm with respect to the availability of credit." Br. at 5. But the Act imposes no such hurdle on *willfulness* claimants. The Act does not require a consumer to wait for unreasonable credit reporting procedures to result

in the denial of credit or other consequential harm before enforcing her statutory rights. It requires regulated companies to use "reasonable procedures" when "prepar[ing]a consumer report" "with respect to" a given consumer, and creates a cause of action in favor of the consumer when they do not. 15 U.S.C. §§ 1681e(b), 1681n(a).

Section 1681n, which creates the cause of action for willful violations, also does not impose the consequential-damages requirement that defendants wish to add to the statute. "Any consumer," it says, may sue to recover "any actual damages . . . *or* damages of not less than $100 and not more than $1000" from "[a]ny person who willfully fails to comply with any requirement imposed under [the FCRA] with respect to [that] consumer." 15 U.S.C. § 1681n(a)(1)(A) (emphasis added). Because "actual damages" represent an *alternative* form of relief and because the statute permits a recovery when there are no identifiable or measurable actual damages, this subsection implies that a claimant need not suffer (or allege) consequential damages to file a claim. A comparison with § 1681o buttresses the point: Congress excluded the statutory-damages option in negligence cases. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted).

Case law in this and related areas backs up this interpretation. In *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948 (7th Cir. 2006), the Seventh Circuit addressed the Act's prohibition on accessing a

consumer's credit score without her consent and the narrow exception created for lenders who are making a "firm offer of credit" to the consumer. *See* 15 U.S.C. § 1681b(c)(1)(B)(i). The court explained that individual-damages issues did not preclude class certification because the class representative could seek statutory damages "without proof of injury" in lieu of actual damages. *Murray*, 434 F.3d at 952–53. Other courts have reached the same conclusion when considering § 1681n statutory damages suits premised on violations of other provisions of the Act. *See Ashby v. Farmers Ins. Co. of Or.*, No. CV 01-1446-BR, 2004 WL 2359968, at *5 (D. Or. Oct. 18., 2004) (holding that no "actual harm" need be proved in an action under § 1681m(a) because "Congress . . . has stated in plain terms that statutory damages are available as an alternative remedy to actual damages"); *accord Gillespie v. Equifax Info. Servs.*, No. 05 C 138, 2008 WL 4614327, at *7 (N.D. Ill. Oct. 5, 2008) (relying on the same reasoning in determining that class treatment was appropriate for a violation of § 1681g(a)(1)'s disclosure requirements); *Murray v. New Cingular Wireless Servs., Inc.*, 232 F.R.D. 295, 302–03 (N.D. Ill. 2005) (reaching a similar conclusion with respect to a FCRA claim premised on a violation of § 1681b(e)).

Courts have reached a like conclusion in considering other statutes that contain similar statutory damages provisions. "[A]ny actual damage[s] sustained by [a consumer] as a result of [a] failure" to comply with the Fair Debt Collection Protection Act are available as an *alternative* to the recovery of statutory damages, suggesting that such damages are not a necessary precondition to suit. *See Fed. Home Loan Mortgage Corp. v. Lamar*, 503 F.3d 504, 513 (6th

Cir. 2007) (noting that the availability of statutory damages under the Fair Debt Collection Protection Act, *see* 15 U.S.C. § 1692k(a), means that "a consumer may recover statutory damages if the debt collector violates the FDCPA even if the consumer suffered no actual damages"). In considering a claim that the anti-wiretapping provisions of 18 U.S.C. § 2520 had been violated, the Seventh Circuit reasoned that, because the statute permits the recovery of "actual damages . . . or statutory damages of not less than $50 and not more than $500," 18 U.S.C. § 2520(c)(1)(A), "the plaintiff need not prove any actual harm," *Apampa v. Layng*, 157 F.3d 1103, 1105 (7th Cir. 1998). We have reached the same conclusion when construing the Truth in Lending Act, 15 U.S.C. § 1640(a), which allows recovery of "any actual damage sustained . . . as a result of the failure" or "twice the amount of any finance charge," *see Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797, 800 (6th Cir. 1996) (holding that a consumer did not need to show that she "suffered actual monetary damages" or that she "was actually misled or deceived" in order to prevail on a TILA claim for statutory damages and attorney's fees); *accord Edwards v. Your Credit, Inc.*, 148 F.3d 427, 441 (5th Cir. 1998); *see also Martinez v. Shinn*, 992 F.2d 997 (9th Cir. 1993) (reaching the same conclusion with respect to the Migrant and Seasonal Agricultural Worker Protection Act, which allows the recovery of "actual damages, or statutory damages," 29 U.S.C. § 1854(c)(1)).

No Article III (or prudential) standing problem arises, it bears adding, if Beaudry is permitted to file this claim. Congress "has the power to create new legal rights, [including] right[s] of action whose only injury-in-fact involves the violation of that statutory

right," *In re Carter*, 553 F.3d 979, 988 (6th Cir. 2009), and the two constitutional limitations on that power do not apply here. First, Beaudry must be "among the injured," in the sense that she alleges the defendants violated *her* statutory rights. *Id.*; *see Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972). Yet that limit poses no obstacle here: Beaudry alleged that she was one of the consumers about whom the defendants were generating credit reports based on inaccurate information due to their failure to update their databases to accommodate the new Tennessee driver's license numbering system. She thus has alleged that the defendants' failure to follow "reasonable procedures to assure maximum possible accuracy" of credit reporting information occurred "with respect to" her, as the statute requires. 15 U.S.C. §§ 1681e(b), 1681n(a). Second, although a right created by Congress "need not be economic in nature, it still must cause individual, rather than collective, harm." *Carter*, 553 F.3d at 989. The Act's statutory damages claim clears this hurdle as well: It does not "authorize suits by members of the public at large," *id.*; it creates an individual right not to have unlawful practices occur "with respect to" one's own credit information, 15 U.S.C. § 1681n. This nexus between the individual plaintiff and the legal violation thus suffices to sustain this statutorily created right. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (sustaining the right of Fair Housing Act market testers to receive "truthful information concerning the availability of housing" from sellers, even in the absence of any further harm).

Urging a contrary conclusion, defendants invoke a long list of cases purporting to support their position. They start with a Sixth Circuit case, claiming that the

"established" law of this circuit requires the dismissal of this claim. Resp. Br. at 9. But the opinion they cite does not contain a holding on the matter at hand, and it is unpublished to boot. *See Nelski v. Trans Union, LLC*, 86 F. App'x 840 (6th Cir. 2004). To be fair to the defendants and to the district court judge who relied on *Nelski*, the opinion does list "injur[y]" as one of four things a plaintiff must prove in a § 1681e(b) claim. *Id.* at 844. But this aspect of the case was pure dictum because the parties *conceded* that an injury had occurred and disputed only the reasonableness of the defendant's credit reporting procedures. *Id.*

In *Washington v. CSC Credit Servs.*, 199 F.3d 263 (5th Cir. 2000), the Fifth Circuit also appears to address today's issue, but it *never mentions* the 1996 amendment to FCRA, which added a statutory-damages remedy as an alternative to the actual damages already provided for willfulness claims. *Id.* at 266–67. With one exception, the decision also relies entirely on pre-1996 cases, *id.*, bolstering the inference that the court never came to terms with (or was not told by the parties about) the amendment. The one exception makes the same mistake. *See Andrews v. Trans Union Corp.*, 7 F. Supp. 2d 1056, 1084 n.33 (C.D. Cal. 1998), *aff'd in part and rev'd in part on other grounds*, 225 F.3d 1063 (9th Cir. 2000), *rev'd*, 534 U.S. 19 (2001). The *Washington* opinion contains nothing to suggest that the panel or parties were aware the statute had been amended in 1996 to permit claims without proof of "actual damages."

Other cases are no more helpful. One case lists an "injury" requirement in connection with the private action for *negligent* FCRA violations under 15 U.S.C. § 1681o, *Philbin v. Trans Union Corp.*, 101 F.3d 957,

963 (3d Cir. 1996), but omits any reference to it when discussing the cause of action for *willful* violations under § 1681n, *see id.* at 970. Analogies to the negligence cause of action offer little assistance to the defendants because § 1681o, unlike § 1681n, allows a plaintiff to recover only actual damages, not statutory damages. Another case, decided in 1983, (1) dealt with an earlier version of the FCRA, which again did not allow for private actions to recover statutory damages until 1996, *see* Pub. L. 104-208, Div. A, Title II, § 2412(b); *see also former* 15 U.S.C. § 1681n(1) (West 1996), and (2) dealt with a negligence claim, not a willfulness one. *See Morris v. Credit Bureau of Cincinnati, Inc.*, 563 F. Supp. 962, 963, 967 (S.D. Ohio 1983).

The refrain continues. A number of cases cite *Nelski*, *Philbin* or *Morris* for the proposition that injury is required in a willfulness action without explaining what they mean by injury and without adding any reasoning to support that conclusion. *See, e.g.*, *Currier v. Transunion Credit Info. Co.*, No. 06-12365, 2008 WL 795738, at *4 (E.D. Mich. Mar. 25, 2008); *Holmes v. TeleCheck Int'l*, 556 F. Supp. 2d 819, 831 (M.D. Tenn. 2008); *Breed v. Nationwide Ins. Co.*, No. 3:05CV-547-H, 2007 WL 1408212, at *1 (W.D. Ky. May 8, 2007). Other cases contain like assertions but again do not address the implications of FCRA's language or rely exclusively on cases that predate the 1996 amendment. *See, e.g.*, *Jackson v. Equifax Info. Servs.*, 167 F. App'x 144, 146 (11th Cir. 2006); *George v. Equifax Mortg. Servs.*, No. 06-cv-971, 2008 WL 4425299, at *7 (E.D.N.Y. Sept. 30, 2008); *Johnson v. Equifax, Inc.*, 510 F. Supp. 2d 638, 647 (S.D. Ala. 2007). Still other cases—the least helpful of all—predate the critical 1996 amendment. *See, e.g.*,

Cahlin v. Gen. Motors Acceptance Corp., 936 F.2d 1151, 1160–61 (11th Cir. 1991); *Pettrus v. TRW Consumer Credit Serv.*, 879 F. Supp. 695, 697 (W.D. Tex. 1994).

The district court and the defendants suggest that, if we read the law to allow statutory damages without proof of injury, we would be creating a strict liability regime. Not so. The existence of a *willfulness* requirement proves that there is nothing "strict" about the state of behavior required to violate the law. And there is an injury requirement because the statute requires the claimant to show that the defendants used unreasonable procedures in preparing a credit report about her. To the extent the defendants worry about violations of the statute that hurt no one—say a willful violation of the "reasonable procedures" requirement that creates no inaccuracies in the data used to generate reports or, better yet, creates inaccuracies that *favor* the consumer—that interesting problem is not presented here. Beaudry alleges that the defendants' systems include *false* and *negative* information about her.

Under these circumstances, Beaudry's claim should not have been dismissed. She has the statutory right to move beyond the Rule 12(b)(6) stage of this case.

III.

That leaves this question: Should we address the district court's rejection of Beaudry's alternative reason for not dismissing the case—her argument that, even if she does not have a damages action, FCRA empowers her to bring an injunction action? We think not.

In filing their motion to dismiss, the defendants did not seek to dismiss the claim on this ground. The issue arose solely in Beaudry's response to the motion to dismiss, apparently as a way to preserve a cause of action of some type should the court reject her damages claim on lack-of-injury or statute-of-limitations grounds. Two years also have passed since Beaudry filed her complaint, raising questions in our minds about whether a claim for injunctive relief would now be moot given the possibility, perhaps likelihood, that the defendants have changed their procedures in the interim.

Adding to our reluctance to resolve the issue at this juncture is the reality that the answer to the question is far from self-evident. In *Washington*, the one court of appeals case to address the issue, the Fifth Circuit held that FCRA's grant to the FTC of the power to obtain injunctive relief, *see* 15 U.S.C. § 1681s(a)(1); *id.* § 45(a), creates a negative inference that FCRA's private right of action, which has no express provision for injunction actions, does not allow individuals to obtain injunctive relief. 199 F.3d at 268. *Washington* may be right, and the district court thus may have been right to rely on it. But the answer is not free from doubt. *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979), points out that a district court should start with the assumption that, in actions over which it has jurisdiction, it has authority to issue injunctive relief. In the absence of "the clearest command to the contrary from Congress," the plaintiff may seek injunctive relief. *Id.*; *see also Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 19 (1974) (holding that the enumeration of specific types of equitable authority in the Freedom of Information Act did not preclude district courts from granting

non-enumerated injunctive relief); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction."); *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 761 (6th Cir. 1999). Further complicating the picture are the conflicting negative inferences created by other parts of the statute. *Compare* 15 U.S.C. § 1681s(c)(1)(A) (explicitly allowing state Attorneys General to pursue injunctive relief—suggesting that such injunctive relief would not otherwise be available); *id.* § 1681u(m) (explicitly allowing injunctive relief under that section—suggesting it would not otherwise be available), *with id.* § 1681u(l) (limiting remedies in that section to those explicitly provided—suggesting that other remedies would otherwise be available implicitly).

Because this issue may no longer have any bearing on this case and because its premature resolution runs the risk of etching error into our case books, we save its resolution for another day. If, as it turns out, the issue remains relevant to the final resolution of this case, the district court is free to certify the issue under 28 U.S.C. § 1292(b) for an immediate interlocutory appeal to us.

IV.

For these reasons, we reverse the dismissal of Beaudry's complaint and remand for further proceedings.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-6428

[Filed August 28, 2009]

CHERYL BEAUDRY, individually and on behalf of all others similarly situated, Plaintiff - Appellant,	)
v.	)
TELECHECK SERVICES, INC., TELECHECK INTERNATIONAL, INC. and FIRST DATA CORPORATION, Defendants - Appellees.	)

Before: KEITH, SUTTON and WHITE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court dismissing the lawsuit of plaintiff Cheryl Beaudry is REVERSED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Leonard Green Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

Case No. 3:07-0842

[Filed June 10, 2008]

CHERYL BEAUDRY, individually and on behalf of all others similarly situated,	)
Plaintiff,	)
v.	)
TELECHECK SERVICES, INC., TELECHECK INTERNATIONAL, INC. and FIRST DATA CORPORATION,	)
Defendants.	)

District Judge Trauger
Class Action Complaint

MEMORANDUM

The defendants have filed a Motion to Dismiss (Docket No. 10), to which the plaintiff has responded in opposition (Docket No. 22), and the defendants have

replied (Docket No. 26). For the reasons explained herein, the defendants' motion will be granted.

I. Introduction

Plaintiff Cheryl Beaudry brings this action individually and on behalf of the class she seeks to represent against defendants TeleCheck Services, Inc. and TeleCheck International, Inc. (collectively referred to as "TeleCheck") and First Data Corporation, alleging that the defendants violated the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, *et seq*. Ms. Beaudry contends that the defendants, operators of check authorization services, failed to adopt reasonable procedures to assure maximum possible accuracy of consumers' personal information contained in certain reports.

In Count I of the Complaint, Ms. Beaudry contends that the defendants willfully violated the FCRA. Ms. Beaudry seeks statutory and punitive damages for those alleged willful violations. In Count II of the Complaint, Ms. Beaudry alternatively contends that the defendants negligently violated the FCRA. Under both counts, Ms. Beaudry seeks (1) a declaratory judgment that the defendants have engaged in a pattern or practice of conduct that violates the FCRA and, specifically, the provisions of 15 U.S.C. § 1681e(b), and (2) a declaratory judgment that the defendants' violations of the FCRA were willful or negligent. Ms. Beaudry also requests a permanent injunction and other equitable relief necessary to undo the effects of the defendants' alleged past and current violations of the FCRA and to prevent such violations from occurring in the future, including, but not limited to, restructuring of the defendants' policies, practices and

procedures, systems, databases, and files in a manner that complies with the provisions of the FCRA, including 15 U.S.C. § 1681e(b).

The defendants now move to dismiss the plaintiff's claims, contending that (1) her Complaint fails to allege an essential element of her claim (injury); and (2) her claims are barred by the FCRA's two-year statute of limitations. In response, the plaintiff argues that (1) she has adequately alleged a FCRA claim because she is not required to prove an actual injury or harm in order to maintain claims for violations of 15 U.S.C. § 1681e(b); (2) her claims are not barred by the statute of limitations; and (3) there is a private right of action for declaratory or injunctive relief under the FCRA, and the plaintiff has stated a claim for such relief. In reply to the plaintiff's response, the defendants contend that the declaratory and injunctive relief sought by the plaintiff is not available under the FCRA.

II. Background

The plaintiff contends that the three defendants are engaged in a common enterprise, which includes operations related to consumer reporting. (Docket No. 1, Compl. ¶ 36)(hereinafter "Compl."). According to the plaintiff, First Data Corporation exercises exclusive dominion and control over the remaining defendants, which are wholly-owned subsidiaries and operate as First Data Corporation's alter egos. (Compl. ¶ 37). Specifically, the plaintiff alleges that these defendants provide payment processing services to businesses, including check verification, and claim to use their proprietary databases to assist in verifying that a check writer is a reasonable credit risk for a business

or to guarantee that approved checks presented to businesses for payment will be collectible. (Compl. ¶¶ 43-45). The defendants maintain databases that contain information regarding consumers' check writing histories that are used in the verification or guarantee process. *(Id.)*

Procedurally, when a consumer presents a check as a method of payment, the business processes it through the defendants' system, typically by way of a terminal or by phone. (Compl. ¶ 24). The check is processed by the clerk at the point of sale, who inputs identifiers unique to that consumer, primarily a driver's license and/or bank number (MICR number). *(Id.)* The transaction is then processed through the defendants' systems and databases, at which time the business receives a "code" indicating whether the check is accepted with a "Code 1," declined with a "Code 4" (which, according to the defendants, means that there is evidence of an unpaid item, such as a returned check, in the database regarding the consumer), declined with a "Code 3" (which the defendants claim is a risk-based decline regarding the consumer), or declined with a "Code 0" (call center code). *(Id.)*

Plaintiff Beaudry claims that she and the class she seeks to represent have presented checks or electronic funds transfers to businesses utilizing First Data Corporation and TeleCheck's services or to banks utilizing their account services. (Compl. ¶ 59). After the state of Tennessee modified its driver's license numbering system from an eight-digit to a nine-digit format in February 2002, the defendants allegedly failed to follow reasonable procedures to assure that the plaintiff's old driver's license number was

associated with her new nine-digit driver's license number in defendants' databases, systems, files, and information. *(Id.* ¶ 60). As a result, the plaintiff asserts that, on the first occasion her new driver's license number was entered as an identifier into the defendants' system, she appeared as a first-time check writer. *(Id.)* She claims that the defendants' failure to follow reasonable procedures to assure maximum possible accuracy of the information concerning her and other individuals about whom the defendants' consumer reports relate constitutes violations of 15 U.S.C. § 1681e(b). *(Id.* ¶ 96).

III. Standard of Review

In deciding a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court will accept as true the facts as the plaintiff has pleaded them. *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 619 (6th Cir. 2002); *Performance Contracting, Inc. v. Seaboard Sur. Co.*, 163 F.3d 366, 369 (6th Cir. 1998). The Federal Rules of Civil Procedure require only that a plaintiff provide "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). The court must determine only whether "the claimant is entitled to offer evidence to support the claims," not whether the plaintiff can ultimately prove the facts alleged. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). "Indeed it may appear on the face of the pleadings that recovery is very remote and unlikely but that is not the test." *Scheuer*, 416 U.S. at 236. Rather, challenges to the merits of a plaintiff's claim should be "dealt with

through summary judgment under Rule 56." *Swierkiewicz*, 534 U.S. at 514.

In *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S. Ct. 1955, 1964-65 (2007), the Supreme Court readdressed the pleading requirements under the federal rules. The Court stressed that, although a complaint need not plead "detailed factual allegations," those allegations "must be enough to raise a right to relief above the speculative level." *Id.* at 1964-65. "The factual allegations, assumed to be true, must do more than create speculation or suspicion of a legally cognizable cause of action; they must show *entitlement* to relief." *League of United Latin Am. Citizens v. Bredesen*, No. 03-5306, 2007 U.S. App. LEXIS 20556, at *6 (6th Cir. Aug. 28, 2007) (citing *Twombly*, 127 S. Ct. at 1965). Further, the Court observed that Federal Rule of Civil Procedure 8(a)(2) does require a "showing" that the plaintiff is entitled to relief and that this substantive threshold is not achieved by conclusory assertions. *Twombly*, 127 S. Ct. at 1965 n.3.

Although Federal Rule of Civil Procedure 8 establishes a "liberal system of notice pleading," *see E.E.O.C. v. J.H. Routh Packing Co.*, 246 F.3d 850, 851 (6th Cir. 2001), "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 127 S. Ct. at 1964-65 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Accordingly, to survive a motion to dismiss, "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 1965; *see also Swierkiewicz*, 534 U.S. at

508 n.1; *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer*, 416 U.S. at 236 (a well-pleaded complaint may proceed, even if it appears "that a recovery is very remote and unlikely").

As is required at the motion to dismiss stage, the court relies on the allegations in the complaint and, for purposes of resolving the pending motion to dismiss, accepts those allegations as true. *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir. 1997).

IV. Analysis

The FCRA was enacted in 1970 "to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2205-06 (2007)(citations omitted). More specifically, Congress enacted the FCRA "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel insurance, and other information in a manner which is fair and equitable to the consumer with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information. . . ." 15 U.S.C. § 1681(b). The FCRA imposes distinct obligations on three types of entities: consumer reporting agencies, users of consumers reports, and furnishers of information to consumer reporting agencies. *Carney v. Experian Info. Solutions, Inc.*, 57 F. Supp.2d 496, 500 (W.D. Tenn. 1999). A consumer is authorized to bring suit for willful or negligent violations of the responsibilities enumerated by the statute. 15 U.S.C. §§ 1681n, 1681o. The court should liberally construe

the FCRA in favor of the consumer. *Jones v. Federated Fin. Reserve Corp.*, 144 F.3d 961, 964 (6th Cir. 1998).

The plaintiff's FCRA claims are based on allegations of inaccuracy of consumer information provided to merchants. She brings these claims under 15 U.S.C. § 1681e(b), which requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy" when preparing a "consumer report." In the Sixth Circuit, to establish a *prima facie* case of inaccuracy under 15 U.S.C. § 1681e(b), a plaintiff must prove: "(1) the defendant reported inaccurate information about the plaintiff; (2) the defendant either negligently or willfully failed to follow reasonable procedures to assure maximum possible accuracy of the information about the plaintiff; (3) the plaintiff was injured; and (4) the defendant's conduct was the proximate cause of the plaintiff's injury." *Nelski v. Trans Union, LLC*, 86 Fed. Appx. 840, 844 (6th Cir. 2004); *see also Currier v. Transunion Credit Info. Co.*, 2008 WL 795738, at *4 (E.D. Mich. Mar. 25, 2008); *Breed v. Nationwide Ins. Co.*, 2007 WL 1408212, at *1 (W.D. Ky. May 8, 2007); *Garrett v. Trans Union, L.L.C.*, 2006 WL 2850499, at *13 (S.D. Ohio Sept. 29, 2006)(finding that a plaintiff must prove these "well established elements" to sustain a claim under § 1681e(b)).

The parties' instant disagreement focuses on the third element of injury.[1] According to the defendants,

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[1] At this stage of the proceedings, the defendants apparently do not dispute that they are "consumer reporting agencies" within the meaning of the FCRA and subject to liability thereunder. *See* 15 U.S.C. § 1681a(f). The defendants note, however, that their references to "reports" in their summary judgment motion "are

because the plaintiff has not alleged that she suffered any adverse impact or injury as a result of the defendants' allegedly inaccurate reports, she has failed to state a claim under 15 U.S.C. § 1681e(b). The defendants point out that, in fact, the plaintiff has completely failed to plead any injury at all: "She has not, for instance, alleged that she has ever had a check declined or any other transaction terminated as a result of a recommendation TeleCheck made to a merchant." (Docket No. 11 at 7).

In her Complaint, the plaintiff alleges that she "now [suffers] and will continue to suffer irreparable injury." (*See* Compl. ¶¶ 98, 102). However, in the court's opinion, this allegation is a conclusory statement unsupported by any factual allegations in her Complaint. Consequently, the allegation falls short of satisfying the plaintiff's Rule 8 obligations as articulated in *Twombly*. In her Complaint, the plaintiff makes no other allegations of harm or injury resulting from the defendants' alleged conduct.

However, the plaintiff argues that she is not required to plead or prove any injury because the FCRA allows plaintiffs to recover statutory damages if they can show a willful violation of 15 U.S.C. § 1681e(b), regardless of whether they have suffered an actual injury or not. (*See* Plf.'s Resp., Docket No. 22 at 8-18). Following this logic, a plaintiff would need only to show that the defendants willfully provided consumer reports to merchants without following

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not intended to waive or contradict arguments in this or other lawsuits that certain recommendations provided to merchants do not constitute 'consumer reports.'" (Docket No. 11 at 3 n.1).

reasonable procedures to assure maximum possible accuracy of that information. (*Id.* at 17). The plaintiff alleges that she has set forth such allegations and, thus, has adequately pleaded a claim under § 1681e(b).

The court disagrees with the plaintiffs' reading of the statute and case law. Under *Nelski*, proof of harm or injury is one of four essential elements of an FCRA claim, regardless of whether the plaintiff alleges there was a willful violation. *See Nelski*, 86 Fed. Appx. 840, 844; *Holmes v. TeleCheck*, 2008 WL 118064, at *8 (M.D. Tenn. Jan. 10, 2008)(Campbell, J.)(setting forth the elements as articulated by the *Nelski* court)[2] ; *see also Pettrus v. TRW Consumer Credit Service*, 879 F. Supp. 695, 697-98 (W.D. Tex. 1994)(holding that § 1681e(b) does not impose strict liability on a defendant simply because there may have been inaccuracies in a consumer report issued by defendant; a violation of § 1681e(b) only occurs when a plaintiff suffered some discernable injury as a result of defendant's conduct). The *Nelski* court, in a decision rendered some eight years after the amendments to the FCRA,[3] affirmed the district court's grant of

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[2] When counsel raised this same argument in the *Holmes* case, the Honorable Todd J. Campbell ruled from the bench: "One is the question of injury. In the view of the Court based on the Nelski case there is a requirement for injury and I am going to include that as a discussion in what needs to be proved." (Trial Transcript at 15, Ex. B to Docket No. 32). When Judge Campbell later set forth the elements of the claims of negligent and willful noncompliance with the FCRA, he included the element of injury. (Trial Transcript at 82, Ex. C to Docket No. 33).

[3] The 1996 amendments to the FCRA permitted recovery of statutory damages based on a willful violation of the FCRA. 15 U.S.C. § 1681n(a). In her response to the defendants' motion,

summary judgment to the defendant consumer reporting agency, agreeing with the district court that the plaintiff had not established the second element of her § 1681e(b) claim because she had failed to show that Trans Union's procedures were unreasonable in any way. *Id.* at 844-47. In its analysis, the court specifically noted that the defendant did not dispute "the information it reported was inaccurate nor does it appear to contest Nelski suffered at least some cognizable injury." *Id.* at 844. "As a result," the Sixth Circuit concluded, "the case turn[ed] on the reasonableness of Trans Union's procedures." *Id.* The court did not consider the plaintiff's requested relief in assessing whether the plaintiff had stated a viable claim under § 1681e(b). *See id.* at 844-47. Those determinations are separate and distinct. Thus, although statutory damages are recoverable for a plaintiff who proves a willful violation of the FCRA, as Plaintiff Beaudry alleges, the availability of that remedy does *not* relieve a plaintiff of her initial burden of proving the essential elements of her underlying FCRA claim.

Plaintiff Beaudry argues that cases decided before the FCRA amendment are not controlling because the "1996 amendments, which added a claim for statutory damages, promote the private enforcement of the FCRA, especially in situations where consumers may suffer no or little actual harm or damages." (Docket No. 22 at 8). Ms. Beaudry provides no citation of authority for this proposition. In the court's view, she incorrectly conflates the remedies available to a plaintiff with the essential elements of a § 1681e(b) claim. In *Nelski*, a 2004 case, the Sixth Circuit clearly articulated the elements of a claim brought under 15 U.S.C. § 1681e(b). That "the plaintiff was injured" was one of those elements. 86 F. App'x 840, 844. *Nelski* has not been overturned.

As explained above, to state a viable claim under § 1681e(b), a plaintiff must prove the four essential elements set forth in *Nelski*. Because the instant plaintiff's Complaint fails to allege one of those essential elements, she has failed to assert a claim that the defendants committed a violation of § 1681e(b). Therefore, the defendants' motion to dismiss the FCRA claims will be granted, and the plaintiff's FCRA claims will be dismissed.

Next, the plaintiff contends that, even if the court finds that she has failed to state a claim for statutory damages, her FCRA claim is saved because she requests declaratory relief, injunctive relief, statutory damages, and punitive damages. The defendants, however, maintain that the declaratory and injunctive relief sought by the plaintiff is not available under the FCRA to private litigants.

Sections 1681n and 1681o set forth the potential civil liability for noncompliance with the FCRA. Neither section provides for injunctive relief. To this court's knowledge, the Fifth Circuit is the only Circuit to have addressed whether there is a private right of action for declaratory or injunctive relief under the FCRA. In *Washington v. CSC Credit Servs., Inc.*, 199 F.3d 263 (5th Cir. 2000), the Fifth Circuit considered the express language of the FCRA, canons of statutory construction, the affirmative grant of power to the FTC to pursue injunctive relief, and the absence of a similar grant to private litigants, and held that injunctive relief is not available to private litigants. *Id.* at 268. The Court reasoned that, "where Congress intended to allow private injunctive relief under the FCRA, it expressly stated that this relief was available. This

language would be unnecessary if injunctive relief were otherwise available." *Id.* at 269.

The Fifth Circuit in *Washington* observed that lower courts had been split as to whether the FCRA allows private litigants to maintain a claim for injunctive relief. *Id.* at 268. *Washington* has since become the leading case on this issue. *See Young v. HSBC Mortgage Servs., Inc.*, 2007 WL 2083680, at *1 (E.D. Mo. 2007)(stating "[I]t has been well settled that injunctive relief is not available to private plaintiffs under the FCRA.")(citations omitted); *Campos v. Choicepoint, Inc.*, 237 F.R.D. 478, 482 n.8 (N.D. Ga. 2006)("There is no private right of action for injunctive relief under the FCRA."); *Thompson v. Homecomings Fin.*, 2005 WL 3534237, at *4 (N.D. Tex. Dec. 19, 2005)("Private litigants may not seek injunctive or equitable relief against a consumer reporting agency."); *Howard v. Blue Ridge Bank*, 371 F. Supp.2d 1139, 1145 (N.D. Cal. 2005)("The Court considers the express inclusion of injunctive relief in certain provisions of the FCRA and its omission from the provisions creating plaintiff's cause of action to be a sufficiently 'clear command' from Congress that injunctive relief is not available to the plaintiff.").

At least three district court cases from within the Sixth Circuit have since addressed the issue. *See Holmes v. TeleCheck,* 2008 WL 118064, at *8 (M.D. Tenn. Jan. 10, 2008)(Campbell, J.); *Presley v. Equifax Credit Informational Servs., Inc.,* 2006 WL 2457978, *2-3 (E.D. Ky. 2006); *Lewis v. Ohio Prof'l Elec. Network, LLC*, 248 F. Supp.2d 693, 704 (S.D. Ohio 2003). The *Lewis* court deferred on the injunctive relief issue and decided the case on other grounds. The *Presley* court adopted the Fifth Circuit's reasoning in

Washington, finding it "compelling" and "the more direct approach." *Id.* at *2. Most recently, Chief Judge Campbell of this district found in *Holmes* "that the better view is that injunctive relief is not available to private litigants under the FCRA." 2008 WL 118064, at *26. This court likewise agrees. The cases relied upon by Plaintiff Beaudry do not otherwise persuade the court. Accordingly, the plaintiff's request for declaratory and injunctive relief fails as a matter of law.

Finally, the defendants contend that the plaintiff's claims are barred by the FCRA's statute of limitations. The FCRA expressly provides for a two-year statute of limitations with the following language:

> An action to enforce any liability created under this subchapter may be brought . . . not later than the earlier of –
>
> (1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or
>
> (2) 5 years after the date on which the violation that is the basis for such liability occurs.

15 U.S.C. § 1681p. As explained by one court, "[b]y its terms, then, the statute of limitations requires a potential plaintiff to assert his claim within two years of his discovery of a violation of the FCRA, but in no case later than five years after the actual violation occurred." *Packer v. Security Nat'l Auto. Acceptance Corp.*, 2007 WL 515409, at *4 (E.D. Va. Feb. 8, 2007). The present statutory language was modified in 2003. *Id.* "The 2003 amendment replaced a limited discovery

exception, for cases involving a defendant's willful misrepresentation of material information, with a general discovery rule, permitting a plaintiff to bring an action within two years of his discovery of the violation, so long as the action is brought within five years of the violation itself." *Id.*

The "discovery rule" holds that "the statute of limitations begins to run when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Dixon v. Clem*, 492 F.3d 665, 671 (6th Cir. 2007)(quoting *Collard v. Ky. Bd. of Nursing*, 896 F.2d 179, 183 (6th Cir. 1990)). "[A] plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence." *Collard*, 896 F.2d at 183.

Responding to the defendants' argument that her FCRA claims are barred by the two-year statute of limitations, the plaintiff asserts that: (1) her claims against the defendants did not accrue shortly after September of 2002 because she may not have received a Tennessee driver's license with a nine-digit number in September of 2002; (2) the defendants' violations of § 1681e(b) are continuing and, therefore, her claims based on those violations are not time-barred; and (3) the defendants have improperly applied the "discovery rule" applicable under the FCRA and that, under a correct application of that rule, the plaintiff's claims are not barred.

Whatever the plaintiff's arguments, the court is unable to address them at this time. In order to determine whether the plaintiff's FCRA claims are time-barred, as defendants now posit, the court would need to consider the plaintiff's allegations regarding

when she knew or had reason to know of the injury which is the basis of her action. *See Packer*, 2007 WL 515409, at *3; *Dixon*, 494 F.3d at 671; *Collard*, 896 F.2d at 183. Having determined that the plaintiff failed to allege *any injury* caused by the defendants' alleged FCRA violations, the court cannot undertake this analysis.

In their motion to dismiss the plaintiff's claims, the defendants concede this point: "[T]he allegations in Plaintiff's Complaint demonstrate that she has not suffered any injury as a result of the inaccuracies she claims existed in TeleCheck's system. Accordingly, it is difficult to ascertain the time from which the FCRA's two-year statute of limitations began to run." (Docket No. 11 at 10). The defendants surmise that, "[b]ased on the nature of the FCRA violations alleged in the Complaint, however, the best inference is that the limitations period began to run in or shortly after September 2002." (*Id.*) While the defendants' inference seems consistent with the theory advanced in the plaintiff's Complaint, it is not appropriate for the court to make assumptions of this nature. For example, there are no facts pleaded in the Complaint regarding when Ms. Beaudry first presented her nine-digit Tennessee driver's license to a TeleCheck or First Data Corporation merchant. The plaintiff does not attempt to explain what negative consequences occurred, if any, as a result of these unspecified transactions.

In her response to the defendants' motion, the plaintiff asks that, if the court grants the defendants' motion and dismisses her FCRA claims, she be given an opportunity to amend her Complaint to assert an adverse action if she suffered one; if she did not, the plaintiff asks the court to allow her to amend the

pleading to substitute a representative plaintiff. (Docket No. 22 at 21). With respect to the statute of limitations argument, the plaintiff states that, if the court finds that none of her claims is timely, the appropriate ruling would be to dismiss Beaudry's individual claim, but permit a motion by the plaintiff to substitute a representative plaintiff. (*Id.*) Plaintiff's counsel requests a period of ninety (90) days in order to make these substitutions if necessary. (*Id.*)

The court will grant the plaintiff leave to amend.

V. Conclusion

For the reasons stated above, the defendants' motion to dismiss will be granted.

Entered this 10th day of June, 2008.

/s/
ALETA A. TRAUGER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No. 3:07-0842

[Filed June 10, 2008]

CHERYL BEAUDRY, individually and on behalf of all others similarly situated,	)
Plaintiff,	)
v.	)
TELECHECK SERVICES, INC., TELECHECK INTERNATIONAL, INC. and FIRST DATA CORPORATION,	)
Defendants.	)

District Judge Trauger
Class Action Complaint

ORDER

For the reasons expressed in the accompanying Memorandum, the defendants' motion to dismiss (Docket No. 10) is hereby GRANTED.

It is further ORDERED that the plaintiff may file an amended complaint within 45 days of the entry of this Order. If no such amended complaint is timely filed, this case will be closed.

It is so ordered.

Entered this 10th day of June, 2008.

/s/
ALETA A. TRAUGER
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-6428

[Filed November 25, 2009]

CHERYL BEAUDRY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,	)
Plaintiff-Appellant,	)
v.	)
TELECHECK SERVICES, INC., ET AL.,	)
Defendants-Appellees.	)

ORDER

BEFORE: KEITH, SUTTON, and WHITE, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Leonard Green Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 08-6428

[Filed December 23, 2009]

CHERYL BEAUDRY, Individually and on behalf of all others similarly situated,	)
Plaintiff - Appellant	)
v.	)
TELECHECK SERVICES, INC.; TELECHECK INTERNATIONAL, INC.; FIRST DATA CORPORATION,	)
Defendants - Appellees	)

ORDER

BEFORE: KEITH, SUTTON, WHITE, Circuit Judges

Upon consideration of appellees' motion to stay mandate,

It is ORDERED that the mandate be stayed to allow appellees time to file a petition for a writ of certiorari, and thereafter until the Supreme Court

disposes of the case, but shall promptly issue if the petition is not filed within ninety days from the date of final judgment by this court.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/ _____

Issued: December 23, 2009

Supreme Court, U.S.
FILED
MAR 29 2010
OFFICE OF THE CLERK

No. 09-1032

In The
Supreme Court of the United States

TELECHECK SERVICES, INC.,
TELECHECK INTERNATIONAL, INC.
and FIRST DATA CORPORATION,

Petitioners,

v.

CHERYL BEAUDRY, individually and
on behalf of all others similarly situated,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, the Consumer Data Industry Association ("CDIA") provides the following disclosure.

CDIA is a trade association. No publicly held company owns 10% or more of CDIA stock.

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INTEREST OF *AMICUS CURIAE*[1]

The Consumer Data Industry Association ("CDIA"), submits its brief in support of petitioners, TeleCheck Services, Inc., TeleCheck International, Inc., and First Data Corporation (*hereinafter*, collectively, "TeleCheck").

CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies ("CRAs") in the marketplace. CDIA is the largest trade association of its kind in the world. Its membership includes more than 200 consumer credit and other specialized CRAs operating in the United States and throughout the world.

In its more than 100-year history, CDIA has worked with the United States Congress and state

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. All parties have consented to the filing of CDIA's *amicus* brief. The consent letters have been filed with the Clerk of Court.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer report information. In this role, CDIA participated in the legislative efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA") in 1970 and its subsequent amendments.

CDIA is vitally interested in the outcome of this case because the court of appeals' decision reverses established law in the Sixth Circuit, conflicts with the decisions of another federal court of appeals, and deprives CRAs of an essential defense, relied upon hundreds of times each year, to obtain summary judgment for claims alleged by *uninjured* plaintiffs. Without the ability to obtain pre-trial dispositive rulings, CDIA's member CRAs may be compelled to settle hundreds of such claims each year, particularly in the class action context, rather than risk trials if plaintiffs are no longer required to prove that they were injured by the CRAs' alleged willful failure to: (i) follow reasonable procedures when preparing consumer reports to assure the maximum possible accuracy of consumer report information; or (ii) conduct a reasonable reinvestigation to determine the accuracy of consumer report information that is disputed by the consumer.

Because CDIA has been involved in the consumer reporting industry for more than a century, its experience can provide the Court with a unique perspective on the consequences of the court of appeals' decision.

SUMMARY OF ARGUMENT

Under the FCRA, the reasonableness of any procedures that a plaintiff alleges should have been adopted by a CRA to assure the maximum possible accuracy of a consumer report is measured against the burden such procedures would impose upon the CRA. A CRA acts unreasonably in not adopting the procedures only if the potential consumer injury outweighs the burden on the CRA of adopting procedures that would have prevented the injury. In this way, the FCRA balances the needs of commerce and the needs of the consumer. If not corrected, the court of appeals' decision upsets this carefully crafted Congressional balance.

Under the court of appeals' decision, actual consumer injury no longer needs to be considered when evaluating the reasonableness of a CRA's accuracy or reinvestigation procedures. Instead the plaintiff need only allege that a CRA followed unreasonable procedures to produce a consumer report about the plaintiff without any allegation that the report caused an actual injury to the plaintiff.

The court of appeals' decision reverses its own recent precedent, conflicts with the decisions of the Seventh Circuit Court of Appeals, and fails to provide any standard against which CRAs, courts, or juries, can measure the reasonableness of a CRA's procedures to assure the maximum possible accuracy of the reports it furnishes or the reasonableness of its

reinvestigation procedures when responding to a consumer's accuracy dispute.

The court's decision may deprive CRAs of an essential defense to consumer claims that CRAs rely upon hundreds of times each year to obtain dispositive rulings against plaintiffs who either fail to allege injury, or fail to produce evidence of injury during summary judgment proceedings. Without this defense, CRAs may be compelled to settle hundreds of such claims each year, particularly if pled as class actions, rather than risk trials if plaintiffs are no longer required to prove that they were injured by the CRAs' alleged willful failure to follow reasonable accuracy or reinvestigation procedures.

This Court should grant TeleCheck's petition for writ of *certiorari* to restore Congress' carefully crafted balancing of consumer and CRA interests that have been disrupted by the court of appeals' decision.

ARGUMENT

CDIA agrees with TeleCheck that the court of appeals' decision directly conflicts with the decisions of the Seventh Circuit Court of Appeals as to whether injury remains an essential element of an FCRA claim alleging willful violations of 15 U.S.C. §§ 1681e(b) or 1681i(a) after the 1996 amendment permitting

consumers to recover between $100 and $1,000 for willful violations.[2]

CDIA provides its brief to explain the impact of the court of appeals' decision on the consumer reporting industry and the importance of the federal question presented by TeleCheck's petition.

I. BY REQUIRING CONSUMER INJURY FOR CLAIMS ALLEGING WILLFUL VIOLATIONS OF § 1681e(b) OR § 1681i(a), THE FCRA'S REASONABLENESS STANDARD PRESERVES THE CONSUMER-CRA BALANCE STRUCK BY CONGRESS.

When the FCRA was enacted in 1970, the U.S. Congress recognized that the efficient functioning of the consumer reporting industry was vital to the U.S. economy.[3] Consumer reports are even more important today. Billions of items of consumer data are furnished to CRAs each month by as many as 40,000

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[2] Petitioners' brief at 8-13.

[3] 15 U.S.C. § 1681(a)(1) ("The banking system is dependent upon fair and accurate credit reporting."); 15 U.S.C. § 1681(a)(2) (the consumer reporting system is an "elaborate mechanism" for investigating and evaluating a consumer's credit worthiness, credit standing, credit capacity, character, and general reputation); *TRW, Inc. v. Andrews*, 534 U.S. 19, 23 (2001) ("Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy.").

data furnishers,[4] resulting in the creation and maintenance of files on nearly 200 million consumers, containing 2.6 billion tradelines.[5] This information is used more than 1.5 billion times each year by creditors, insurers, employers, landlords, law enforcement and counter-terrorist agencies to make important risk-based decisions, hire employees, evaluate the backgrounds of potential tenants, and locate individuals suspected of criminal activity.[6] By making reliable data available to users, CRAs provide the information infrastructure that contributes to the soundness and efficiency of the banking, finance, retail credit, insurance, housing and law enforcement systems in the United States.

Because the value of consumer report information is directly related to its timeliness and accuracy, a perfect information standard has never been part of a CRA's obligation under the FCRA. The delay inherent in such a requirement would impair the very

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[4] *Sarver v. Experian Information Solutions*, 390 F.3d 969, 972 (7th Cir. 2004) ("the company gathers information originated by approximately 40,000 sources").

[5] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (2004) at 8-9, <http://www.ftc.gov/reports/facta/041209factarpt.pdf>.

[6] *Id.*; *Sarver*, 390 F.3d at 972; Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* at vi (May 2003), <http://www.ftc.gov/bcp/workshops/ infoflows/statements/cate02.pdf>.

efficiencies that the FCRA was enacted to promote.[7] Instead, to protect consumers, the FCRA has, since 1970, required CRAs to "adopt reasonable procedures for "meeting the needs of commerce" that are "fair and equitable to the consumer with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information. . . ."[8] The careful balancing of these sometimes different interests is reflected in the "reasonableness" standard that appears throughout the FCRA.[9] That the FCRA achieves its objectives only if the interests of consumers, CRAs, furnishers of information, and users of consumer reports are held in balance should inform any interpretation of FCRA provisions, such as 15 U.S.C. §§ 1681e(b) and 1681i(a), that include a reasonableness standard.

A. The FCRA's reasonableness standard.

When preparing consumer reports, CRAs must "follow *reasonable procedures* to assure maximum possible accuracy of the information concerning the individual about whom the report relates."[10] A CRA that receives a consumer dispute must "conduct a

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[7] 15 U.S.C. § 1681(a)(1).

[8] 15 U.S.C. § 1681(b).

[9] *See, e.g.*, 15 U.S.C. §§ 1681(b), 1681d(d)(4)(A), 1681e(a) & (b), 1681i(a)(1)(A) & 1681i(a)(5)(C).

[10] 15 U.S.C. § 1681e(b) (emphasis added).

reasonable reinvestigation to determine whether the disputed information is inaccurate. . . ."[11]

Evaluating the "reasonableness" of a CRA's accuracy or reinvestigation procedures necessarily requires a balancing of the burdens to be imposed on the CRAs by any contemplated procedures against the harm that could result from the inaccurate consumer reports or inadequate dispute reinvestigation procedures if the procedures are not adopted.[12] "Reasonableness" for § 1681e(b) and § 1681i(a) purposes loses all meaning if a consumer need not allege, much less prove, that an injury was caused by the violation of a reasonableness standard. Under such an approach, no burden would be too great to impose on CRAs if a court, or jury, need not even consider whether the consumer's possible injury, however trivial, inconsequential, or even nonexistent, justifies the cost of the procedures to the CRAs to avoid the unspecified injury.

A reasonableness standard with no injury requirement provides no standard against which CRAs

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[11] 15 U.S.C. § 1681i(a)(1)(A) (emphasis added).

[12] *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47, 51 (D.C. Cir. 1984); *Whelan v. Trans Union Credit Reporting Agency, et al.*, 862 F.Supp. 824, 832 (E.D.N.Y. 1994); *Wiggins v. Equifax Services, Inc.*, 848 F.Supp. 213, 219 (D.C. Dist. 1993); *Houston v. TRW Information Services, Inc.*, 707 F.Supp. 689, 693 (S.D.N.Y. 1989).

may measure the reasonableness of their procedures.[13] Instead, "reasonableness" means what the court or jury says it means on a case-by-case, *post-hoc*, basis regardless of the magnitude of the burden imposed upon the CRAs. Such an outcome elevates the consumer's accuracy interests far above the needs of commerce and the efficiency of the U.S. financial system and undermines Congress' carefully crafted balancing of those interests in the FCRA.

B. The court of appeals' decision upsets Congress' carefully crafted balancing of consumer and CRA interests in the FCRA.

The district court granted TeleCheck's motion to dismiss Beaudry's complaint because she failed to allege that she was injured by TeleCheck's alleged violation of § 1681e(b). The court of appeals reversed the district court's decision, holding:

> Beaudry, to start, alleged that the defendants violated § 1681e(b) "with respect to" her just as the statute requires.
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> * * *

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[13] *Sarver v. Experian Information Solutions*, 390 F.3d 969, 972-73 (7th Cir. 2004) ("The increased cost to Experian to examine each of these entries individually would be enormous. We find that as a matter of law there is nothing in this record to show that Experian's procedures are unreasonable.").

> Beaudry thus claims to have suffered the precise "injury" that the statute prescribes: The defendants "*prepare[d] a consumer report*" *about her* but failed to "follow reasonable procedures to assure maximum possible accuracy of the information" it contained. 15 U.S.C. § 1681e(b).[14]

The court reaches its conclusion through an analysis that improperly defines the "injury" requirement out of § 1681e(b): "*And there is an injury requirement because the statute requires the claimant to show that the defendants used unreasonable procedures in preparing a credit report about her.*"[15]

For the court, the existence of the consumer report itself is sufficient injury (*i.e.*, that the report is about the consumer). The court does not explain how the "unreasonableness" of a CRA's accuracy or reinvestigation procedures can be determined if no actual injury is required. Against what measure would the court weigh the burden to be imposed upon CRAs by the procedures a consumer-plaintiff will allege should have been followed? In departing from its own recent precedent, the court's circular reasoning – that the report itself is the injury – provides no guidance for CRAs, or for the district courts that must apply the court of appeals' new standard.

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[14] *Beaudry v. TeleCheck Services, Inc.*, 579 F.3d 702, 705 (6th Cir. 2009) (emphasis added).

[15] *Id.* at 708 (emphasis added).

II. THE COURT OF APPEALS' DECISION DEPRIVES CRAS OF AN IMPORTANT DEFENSE TO CLAIMS BROUGHT UNDER § 1681e(b) AND § 1681i(a).

A. The court of appeals' 2004 decision.

In 2004, the court of appeals held that:

> In order *to assert a claim under § 1681e(b)*, a plaintiff must prove: (1) the defendant reported inaccurate information about the plaintiff; (2) the defendant *either negligently or willfully failed* to follow reasonable procedures to assure maximum possible accuracy of the information about the plaintiff; (3) the *plaintiff was injured*; and (4) the defendant's conduct was the proximate cause of the plaintiffs injury.[16]

Five years ago, the court believed that the *same* "injury" requirement applied to claims alleging *either* the *negligent or willful* violation of § 1681e(b). Five years later, the court believes its prior statement of the essential elements of a § 1681e(b) claim was "pure dictum" and "unpublished to boot."[17]

Although discounting its prior decision, the court nonetheless struggled to find some "injury" to support the reversal of the district court's decision, albeit an injury very different from the one identified in 2004.

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[16] *Nelski v. Trans Union, LLC*, 86 Fed. Appx. 840, 844 (6th Cir. 2004) (emphasis added).

[17] *Beaudry*, 579 F.3d at 707.

Under the court's 2009 analysis, a plaintiff avoids dismissal or summary judgment on a § 1681e(b) claim merely by alleging the existence of unreasonable procedures that lead to the furnishing of a consumer report about the consumer. The plaintiff is not required to allege, much less prove actual injury, or even inconvenience, caused by the report.

Although neither § 1681e(b) nor § 1681n(a) have been amended since the court of appeals' 2004 decision, the court now believes that the 1996 amendment to § 1681n(a)(1), permitting the consumer to recover $100 to $1,000, eliminated actual injury as an essential element of a § 1681e(b) claim. For the court, it is now enough if the consumer report is *about the consumer* – that is the injury. Such an approach cannot be reconciled with the language of § 1681n.

Section 1681n establishes liability for "any actual damages sustained by the consumer as a result of the failure or *damages* of not less than $100 and not more than $1,000."[18] The ordinary meaning of "damages" is: "Money claimed by, or ordered to be paid to, a person as compensation for *loss or injury*."[19] In § 1681n, the use of "damages" in the phrase "*damages* of not less than $100 and not more than $1,000" embodies Congress' intent to restrict recovery to consumers who have in some manner been "unjustly *damaged*

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[18] 15 U.S.C. § 1681n(a)(1)(A) (emphasis added).

[19] Black's Law Dictionary 416 (8th ed. 2004) (emphasis added).

because of inaccurate or arbitrary information in a credit report."[20]

Moreover, whereas the general statutory damages provision provides for "actual damages . . . or *damages* of not less than $100 but not more than $1000,"[21] the provisions that govern a report obtained under false pretenses – where harm can be presumed from the privacy violation – provides for "actual damages . . . or $1,000."[22] This indicates that, except where damages can be presumed, Congress used the term "damages" to restrict statutory damages to consumers who have suffered some actual injury.

Indeed, any contrary reading would be untenable: If § 1681n were interpreted not to require even a minimal level of injury, consumers could recover damages even for errors *from which they benefited* – (*e.g.*, a report inaccurately showing a defaulted debt as being paid in full). There is no evidence that Congress intended such an absurd result. Indeed, such a result would raise a serious constitutional question:

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[20] S. Rep. No. 91-517 (1969), at 1 (emphasis added); *see also, Dowell v. Wells Fargo Bank, NA.*, 517 F.3d 1024, 1026 (8th Cir. 2008) ("[a] reasonable reading of the statute [would] still require proof of actual damages but simply substitute statutory rather than actual damages for the purpose of calculating the damage award").

[21] 15 U.S.C. § 1681n(a)(1)(A) (emphasis added).

[22] *Id.* § 1681n(a)(1)(B); *accord id.* § 1681n(b).

an award of statutory damages to unharmed individuals would be a penalty that bears no rational relationship to any actual harm to the plaintiff.[23]

B. The CRAs' defense to § 1681e(b) and 1681i(a) claims brought by uninjured plaintiffs.

As applied to the CRAs' obligation to prepare a consumer report following "reasonable procedures to assure maximum possible accuracy,"[24] and to "conduct a reasonable reinvestigation to determine whether . . . disputed information is inaccurate,"[25] the FCRA's reasonableness standard should allow CRAs to perform their vital function without subjecting themselves to civil liability for any alleged consumer report inaccuracy, no matter how trivial or inconsequential. The 1996 amendment adding the $100 to $1,000 alternative measure of damages for a willful violation did not alter this. The limited legislative history for the amendment makes clear that, as applied to the CRAs' accuracy and reinvestigation obligations, it was intended to ensure that *injured* consumers could recover from CRAs:

> When [consumer report] information is wrong, lives can be ruined . . . we must

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[23] *See, State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003).

[24] 15 U.S.C. § 1681e(b).

[25] 15 U.S.C. § 1681i(a).

> strengthen consumers' ability to correct false reports as quickly as possible. And when such errors are inflicted *willfully or by negligence*, credit bureaus must know that they will be liable.[26]

Because CRAs produce 1.5 billion consumer reports each year, it is not surprising that they are sued hundreds of times each year by consumers alleging violations of § 1681e(b) or § 1681i(a), or both.[27] Although such lawsuits arise from less than .0001% of the consumer reports furnished each year, the costs of defense nonetheless represent significant expenses for the CRAs that must be passed along to their users and ultimately borne by the consumers themselves in the form of higher costs for the users' goods and services.

Whether recovery for a violation of sections 1681e(b) or 1681i(a) is sought under the FCRA's

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[26] 140 Cong. Rec. H9797 (Sep. 27, 1994) (statement of Mr. Schumer) (emphasis added).

[27] Given the volume of information CRAs receive, process, organize and furnish to fulfill their "vital role," when Congress amended the FCRA in 1996, in part, to add damages of $100 to $1,000 as an alternative recovery for consumers, it understood that "perfect" consumer report information is not possible:

> The [Senate Banking] Committee is aware that the consumer reporting system handles almost two billion pieces of data per month and will never be perfectly accurate. Mistakes will occur, and not all of them can be prevented.

S. Rep. No. 104-185 (1995) (amending the FCRA).

willful violation or negligent violation provisions, consumers must sustain an injury caused by the violation to recover under the FCRA's civil liability provisions.[28] For a willful violation, the consumer may elect to recover either her "actual damages" or damages of between $100 and $1,000.[29]

The availability of statutory damages allows the plaintiff to recover without proof of the *amount* of her damages, but does not eliminate the requirement to prove that some injury occurred and was caused by consumer report inaccuracies that were caused by CRAs' alleged unreasonable procedures.

When consumers either fail to allege injury, or fail to produce evidence of injury at the summary judgment stage, CRAs often obtain the consumer's voluntary dismissal of the complaint or summary judgment from the courts. In any particular year, a CRA can dispose of as many as one-third of its cases in this way.[30] Absent some injury, the FCRA permits

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[28] 15 U.S.C. §§ 1681n(a)(1)(A), 1681o(a)(1).

[29] 15 U.S.C. § 1681n(a)(1)(A).

[30] *See, e.g., Jackson v. Equifax Information Services, LLC*, 167 Fed. Appx. 144, 146 (11th Cir. 2006) (summary judgment granted to CRA when plaintiff, who alleged both negligent and willful violations of § 1681e(b) and § 1681i(a) "failed to produce any evidence indicating that he was damaged as a result of an allegedly inaccurate Equifax report."); *Davis v. Equifax Information Services, LLC*, 346 F.Supp.2d 1164, 1171 (N.D. Ala. 2004) (plaintiff alleging negligent and willful violation of § 1681e(b) "must show that (1) inaccurate information was included in her credit report, (2) the inaccuracy was due to Equifax's failure to

(Continued on following page)

no consumer recovery against CRAs for the alleged willful violation of sections 1681e(b) or 1681i(a):

> An agency can escape liability if it establishes that an inaccurate report was generated following reasonable procedures, *which is generally a jury question*. [citations omitted] A consumer asserting claims under §§ 1681i(a) or 1681e(b) against a credit reporting agency bears the burden of proving that the agency's credit report was a causal factor in the denial of his credit application.[31]

Because the "reasonableness" of the CRA's procedures will generally be a jury question, if – as the court of appeals believes – the injury is simply the existence of a consumer report created by procedures that are alleged to be unreasonable, summary judgment for the CRAs becomes nearly impossible. Conversely, if the court of appeals' decision is reversed, and injury remains a separate element of any claim under § 1681e(b) or § 1681i(a), CRAs may continue to obtain summary judgment against uninjured plaintiffs who present no evidence of injury, and the

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follow reasonable procedures to assure maximum possible accuracy of her credit file, and (3) *she suffered injury which was caused by the inclusion of the inaccuracy entry*.") (emphasis added).

[31] *See, e.g., Jackson v. Equifax Information Services, Inc.*, 167 Fed. Appx. 144, 146 (11th Cir. 2006) (emphasis added) (summary judgment affirmed for CRA on claims that it willfully and negligently violated § 1681e(b) and § 1681i(a)).

dismissal of consumer claims that do not even allege injury.

The court of appeals' decision jeopardizes an important CRA defense. Under its decision, a CRA may be held civilly liable for up to $1,000 to an individual plaintiff, and for perhaps billions of dollars for a class of plaintiffs – none of whom are injured by the CRAs' alleged failure to follow reasonable accuracy and reinvestigation procedures.

The court of appeals' decision fundamentally alters the FCRA's careful balancing of CRA and consumer interests and ignores the procedural consequences of its decision. As a result, CRAs may be deprived of a defense to hundreds of claims brought each year by uninjured plaintiffs who may avoid summary judgment or dismissal of their claims under § 1681e(b) or 1681i(a) because they are no longer required to even allege that the CRAs' unreasonable accuracy and reinvestigation procedures caused their injuries, but only that the procedures resulted in a report about the consumers.

CONCLUSION

For the reasons set forth above, TeleCheck's petition for writ of certiorari should be granted.

Respectfully submitted,

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